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18  
19 IN THE UNITED STATES DISTRICT COURT  
20  
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
22  
23 OAKLAND DIVISION

24  
25 **JOHN ARMSTRONG, et al.,**

26 Case No. C 94 2307 CW

27 Plaintiffs,

28 v.

DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION TO COMPEL  
COMPENSATION

EDMUND G. BROWN JR. et. al.,

Defendants.

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## INTRODUCTION

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3 These are tough economic times. Both the nation and the State of California have struggled  
 4 through this recession. California's unemployment rate hovers above twelve percent, the State's  
 5 educational system has labored under heavy budget cuts, Medicaid coverage has decreased, and  
 6 state employees have been forced to accept substantial pay cuts. (*See* Decl. Feudale, Exs. A & B.)  
 7 In January, the Governor unveiled his budget plan designed to balance California's projected  
 8 twenty-five billion dollar shortfall for the 2011-2012 fiscal year. (*Id.*, Ex. B.) The budget plan  
 9 includes significant cuts in State spending, including further pay cuts for state employees, and  
 10 decreases in funding for the State's Medicaid, welfare, education, and disability-assistive services  
 11 (*Id.*)

12 But Plaintiffs' counsel has prospered. Indeed, in November 2010, the California Inspector  
 13 General issued a report auditing the legal costs associated with the twelve class actions pending  
 14 against the California Department of Corrections and Rehabilitation (CDCR). The report  
 15 indicated that between July 1, 1997 and June 30, 2009, the State paid over \$66 million in  
 16 attorneys' fees to Plaintiffs' counsel for their involvement in twelve class-actions filed against  
 17 CDCR.<sup>1</sup> (*Id.*, Ex. C. pp. 10 n.10, 16.) In *Armstrong* alone, Plaintiffs' received over \$22 million  
 18 in attorneys' fees between 1997 and 2009. (*Id.*, Ex. C. p. 16.)

19 Notwithstanding these substantial sums, Plaintiffs' counsel now demand firm-wide hourly  
 20 rate increases ranging from eight percent to twenty-nine percent over rates negotiated in 2008.  
 21 The rate increases for individual attorneys range from six percent to thirty-nine percent. But  
 22 because these hourly rate increases are inconsistent with the marginal rate increases sought by  
 23 both the national and local legal communities within the same two-year period, Plaintiffs' motion  
 24 to compel must be denied. Alternatively, should the Court find that some rate increase is  
 25 warranted, Defendants request that the Court set Plaintiffs' counsel's firm-wide rate increases at

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27 <sup>1</sup> The Prison Law Office and Rosen, Bien, and Galvan, two of the firms seeking attorneys' fees here, serve as lead counsel on all of the twelve prison class actions referenced in the Inspector General's report.

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1 no greater than a total of 5.2 percent over 2008 rates, which is consistent with national and local  
 2 averages.

3 **STATEMENT OF THE CASE**

4 In June 1994, Plaintiffs—a class comprised of all present and future CDCR inmates and  
 5 parolees with disabilities—filed a complaint against Defendants, alleging that CDCR  
 6 discriminated against the Plaintiff-class in violation of the Americans with Disabilities Act (ADA)  
 7 and § 504 of the Rehabilitation Act by failing to accommodate disabled inmates in providing  
 8 programs, services, and activities. (Docket No. 61.) On September 20, 1996, the Court denied  
 9 Defendants' motion for summary judgment, concluding that Defendants had violated Plaintiffs'  
 10 rights.<sup>2</sup> (Docket No. 157.) Under the terms of a stipulated agreement governing procedures for  
 11 determining liability, the Court then issued a remedial order and injunction requiring Defendants  
 12 to develop a plan for accommodating inmates and parolees with disabilities. (Docket No. 158.)  
 13 The injunction further authorized Plaintiffs to monitor Defendants' compliance with their  
 14 remedial plan by accessing documents, receiving reports, touring institutions, and interviewing or  
 15 deposing inmates and staff. (*Id.*)

16 In March 1997, the Court signed a stipulated order governing the procedure for the periodic  
 17 collection of attorneys' fees and costs associated with Plaintiffs' monitoring. (Docket No. 189.)  
 18 Under the terms of the order, Plaintiffs must submit quarterly statements to Defendants' counsel  
 19 itemizing the time spent on particular tasks. (Stipulation & Order Periodic Collection Attys' Fees  
 20 & Costs 1-2.) The first quarterly statement is to identify the billing rates Plaintiffs' counsel seeks  
 21 for that year. (*Id.* 2.) Defendants then have thirty days to respond with objections and the bases  
 22 therefore. (*Id.*) If there are any disputed billing items, the parties are required to meet and confer  
 23 within thirty days to resolve any disputes. (*Id.*) If any fees disputes remain, Plaintiffs may file a  
 24 yearly motion to compel payment no later than sixty days after the parties have met and conferred  
 25 regarding the fourth quarter billing statement. (*Id.*) If, however, Defendants oppose Plaintiffs'  
 26 billing rates, Plaintiffs must file a motion to compel on the issue following their first quarterly

27  
 28 <sup>2</sup> The claims against the Board of Parole Hearings' (BPH) Executive Director were  
 bifurcated via a stipulation and order dated July 19, 1996. (Docket No. 148.)

1 statement. (*Id.*)

2 Following the first quarter of 2009, as part of the meet and confer process, Plaintiffs' 3 counsel agreed to accept their 2008 rates for work performed in 2009. (Decl. Blevins Supp. 4 Defs.' Opp'n Pls.' Mot. Compel Compensation (Decl. Blevins) ¶ 5.) Following the end of the 5 first quarter of 2010, the parties again met and conferred over Plaintiffs' fees and rates. (*Id.* ¶ 6.) 6 After negotiations, Defendants agreed to pay Plaintiffs' fees and costs for that quarter, but refused 7 to pay Plaintiffs' unreasonable rate increases. (*Id.*) Since that meeting, Defendants have 8 consistently objected to Plaintiffs' proposed rate increases following the submission of Plaintiffs' 9 quarterly billing statements. (*Id.* at ¶ 7.) On August 20, 2010, Plaintiffs filed a motion to compel 10 compensation at their increased hourly rates. (Docket No. 1755.) On October 4, 2010, the Court 11 granted the parties' stipulation to attempt to mediate the rate increase issue and continued the 12 hearing on Plaintiffs' motion. (Docket No. 1783.) The mediation session was held on December 13 14, 2010, but the matter was not resolved. (Decl. O'Bannon Supp. Defs.' Mot. Change Time ¶ 14 3.) Soon thereafter, Defendants sought and were granted a sixty-day extension of time to file 15 their opposition. (See Docket No. 1817.) Defendants now file their opposition to Plaintiffs' 16 motion to compel.

## 17 ARGUMENT

### 18 I. PLAINTIFFS' ANNUAL RATE INCREASES ARE SUBSTANTIALLY HIGHER THAN ANNUAL 19 RATE INCREASES CHARGED BY OTHER BAY AREA FIRMS PRACTICING SIMILAR LITIGATION.

#### 20 A. Plaintiffs Are Only Entitled to a Reasonable Hourly Rate Increase.

21 Under the "American Rule," the prevailing party is ordinarily not entitled to collect 22 attorneys' fees from the losing party unless there is express statutory authorization to the contrary. 23 *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The present action falls within the exception to 24 the general rule. The ADA contains a fee-shifting provision permitting the prevailing party to 25 collect "reasonable attorney's fee[s] . . . and costs . . ." 42 U.S.C. § 12205. Post-judgment 26 monitoring of a court's orders is among the types of services recognized as compensable under 27 the ADA's fee-shifting statute. *See Jackson v. Los Lunas Ctr.*, 489 F. Supp. 2d 1267, 1270-72 28 (D.N.M. 2007).

1           The “reasonableness” of an attorneys’ fee award is determined by using the “loadstar”  
 2 method—multiplying the number of hours reasonably expended on the litigation by a reasonable  
 3 hourly rate. *Hensley*, 461 U.S. at 433; *see also Doran v. Corte Madera Inn Best Western*, 360 F.  
 4 Supp. 2d 1057, 1060 (N.D. Cal. 2005) (applying the loadstar method to determine the  
 5 reasonableness of fees sought under the ADA). The fee applicant bears the burden of establishing  
 6 that his or her requested rates are in line with the “prevailing [market rates] in the [relevant]  
 7 community for similar services by lawyers of reasonably comparable skill, experience, and  
 8 reputation.” *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). This may be established in a  
 9 variety of ways, including, “affidavits by the plaintiffs’ attorney and other attorneys regarding the  
 10 prevailing fees in the community, and rate determinations in other cases, particularly those setting  
 11 a rate for the plaintiffs’ attorney . . . .” *United Steel Workers Of Am. v. Phelps Dodge Corp.*, 896  
 12 F.2d 403, 407 (9th Cir. 1990).

13           The Ninth Circuit has defined that relevant community as “the forum in which the district  
 14 court sits.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 979 (9th Cir. 2008). Here, the  
 15 Northern District of California is the appropriate forum. *See, e.g., Prison Legal News v.*  
 16 *Schwarzenegger*, 608 F.3d 446, 455 (9th Cir. 2010) (finding the Northern District of California to  
 17 be the appropriate forum for determining reasonable attorneys’ fees in a case arising out of  
 18 Oakland, California). Thus, when making a reasonableness determination, a court must award a  
 19 fee that “reflect[s] the economic conditions in the district . . . .” *Moreno v. City of Sacramento*,  
 20 534 F.3d 1106, 1115 (9th Cir. 2008).

21           A key component to a reasonableness determination is the amount requested. Both the  
 22 Supreme Court and the Ninth Circuit have repeatedly admonished district courts to remember that  
 23 the purpose of fee-shifting statutes is not to enrich members of the plaintiff’s bar, but to enable  
 24 private parties to secure legal representation to redress federal rights violations. *Perdue v. Kenny*  
 25 *A.*, 130 S. Ct. 1662, 1676 (2010) (“Section 1988 serves an important public purpose by making it  
 26 possible for persons without means to bring suit to vindicate their rights. But unjust  
 27 enhancements that serve only to enrich attorneys are not consistent with the statute’s aim.”);  
 28 *Pennsylvania v. Delaware Valley Citizens’ Counsel For Clean Air*, 478 U.S. 546, 565 (1986)

1 ("[Fee shifting] statutes were not designed as a forum for economic relief to improve the financial  
 2 lot of attorneys . . ."); *Moreno*, 534 F.3d at 1111 ("In making the [fee] award, the district court  
 3 must strike a balance between granting sufficient fees to attract qualified counsel to civil rights  
 4 cases . . . and avoiding a windfall to counsel . . ."). Indeed, in cases like this one, where  
 5 attorneys' fees are borne, not by individual defendants, but by state taxpayers, federal courts must  
 6 keep a watchful eye on unreasonable fee requests. *See Purdue*, 130 S. Ct. at 1676-77 ("In many  
 7 cases, attorney's fees . . . [A]re paid in effect by state and local taxpayers, and because state and  
 8 local governments have limited budgets, money that is used to pay attorney's fees is money that  
 9 cannot be used for programs that provide vital public services."); *cf. Horne v. Flores*, 129 S. Ct.  
 10 2579, 2594 (2009) ("State and local governments have limited funds. When a federal court  
 11 orders that money be appropriated for one program, the effect is often to take funds away from  
 12 other important programs.").

13 Adhering to these admonitions, federal courts, including this Court, have scrutinized with  
 14 particularity attorneys' proposed rate increases, disallowing those that are excessive. For  
 15 example, in *Citizens For Better Forestry v. USDA*, No. 08-1927 CW, 2010 WL 3222183, at \*1  
 16 (N.D. Cal. Aug. 13, 2010), the plaintiffs sought attorneys' fees under the Equal Access to Justice  
 17 and Endangered Species Acts after successfully challenging the statutory validity of a rule  
 18 promulgated by the United States Department of Agriculture (USDA). In their fees application,  
 19 the plaintiffs sought a \$25 hourly increase from their attorneys' 2008 hourly rates for work  
 20 performed in 2009. *Id.* at \*5. The USDA opposed the application, arguing that a flat rate should  
 21 apply for work performed in 2008 and 2009. *Id.* This Court agreed and refused to award the \$25  
 22 increase, noting that between 2008 and 2009 "the consumer price index . . . which courts employ  
 23 to calculate the cost of living increases for hourly rates declined 0.4 percent."<sup>3</sup> *Id.*

24 Similarly, in *Craigslist, Inc. v. Mesiab*, No. 08-5064 CW (MEJ), 2010 WL 5300883, at \*1  
 25 (N.D. Cal. Nov. 15, 2010), Craigslist sought damages and attorneys' fees after securing a default  
 26 judgment in a copyright dispute. In its fee application, Craigslist sought to recover for work

27 <sup>3</sup> The consumer price index did not significantly change between 2009 and 2010,  
 28 increasing by 1.6 percent. *See* www.bls.gov/cpi/cpid10av.pdf.

1 performed between 2008 and 2010 at different rates which increased incrementally each year. *Id.*  
 2 at \*16. Craigslist's proposed rate increases ranged from a \$5 per hour rate increase for a  
 3 paralegal to a \$120 per hour rate increase for a fifth year associate. *Id.* Magistrate Judge James,  
 4 relying on the 2009-2010 *Laffey* Matrix, refused to award yearly rate increases, noting that there  
 5 was no change in *Laffey* rates between 2008-2009 and 2009-2010.<sup>4</sup> *Id.* at 17 n.9. Instead, Judge  
 6 James awarded rates based on the 2009-2010 *Laffey* Matrix rates for attorneys with the same  
 7 amount of experience, adjusting for the cost of living differences between the District of  
 8 Columbia and San Francisco. *Id.* at 17. This Court subsequently adopted Judge James's Report  
 9 and Recommendation in full, finding it to be "correct, well-reasoned, and thorough." *Craigslist v.*  
 10 *Mesiab*, No. 08-5064 CW, 2010 WL 5300881, at \*1 (N.D. Cal. Dec. 20, 2010).

11 Other courts similarly denied proposed rate increases incongruent with economic realities.  
 12 For example, in *Goray v. Unifund CCR Partners, Inc.*, No. 06-00214 HG-LEK, 2008 WL 240551,  
 13 at \*5 (D. Hawai'i Jun. 13, 2008), *adopted in full by Goray v. Unifund CCR Partners, Inc.*, No.  
 14 06-00214 HG-LEK, 2008 WL 2714369, at \*1 (D. Hawai'i Jul. 11, 2008), the plaintiff sought  
 15 nearly \$83,000 in attorneys' fees and costs after securing partial summary judgment in an action  
 16 brought under the Fair Debt Collection Practices Act. *Goray*, 2008 WL 240551, at \*1. In her  
 17 fee's motion, the plaintiff argued that her counsel's requested rate of \$300 per hour was  
 18 consistent with the current market rate for attorneys with similar experience and noted that the  
 19 court had found her attorney's hourly rate of \$250 per hour reasonable four and a half years  
 20 earlier. *Id.* at \*5. The court denied the plaintiff's proposed rate increase, noting that while some  
 21 increase was warranted because of inflation and the attorney's additional years of experience, a  
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24 <sup>4</sup> The *Laffey* Matrix is a spreadsheet based on hourly billing rates allowed in *Laffey v.*  
 25 *Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other*  
 26 *grounds*, 746 F.2d 4 (D.C. Cir. 1984). The Matrix is regularly updated and adjusted for inflation  
 27 by the Civil Division of the United States Attorney's Office for the District of Columbia and is  
 28 intended to be used in fee shifting cases. *See* [www.justice.gov/usao/dc/Divisions/Civil\\_Division/Laffey\\_Matrix\\_8.html](http://www.justice.gov/usao/dc/Divisions/Civil_Division/Laffey_Matrix_8.html). *Laffey* Matrix rates for  
 June 1, 2010 through May 31, 2011 increased only marginally ranging from \$5 per hour increases  
 for paralegals and lower level associates to \$10 per hour increases for attorneys with eleven to  
 twenty plus years of experience. *See id.*

1 twenty percent fee hike was excessive. *Id.* The judge ultimately reduced the attorney's hourly  
 2 rate to \$280 per hour, a twelve percent increase over four years. *Id.*

3 Similarly, in *Fox v. Cohen Ventures, LLC*, No. 08-81052-CIV, 2009 WL 1393348, at \*1  
 4 (S.D. Fla. May 15, 2009), the plaintiff sought \$9,500 in attorneys' fees and costs after  
 5 successfully negotiating a consent judgment for ADA violations. As part of his fees application,  
 6 the plaintiff sought compensation for two attorneys who worked on his case at rates of \$375 and  
 7 \$325 per hour respectively. *Id.* at \*3. But because these proposed rates were respectively fifteen  
 8 percent and ten percent higher than the hourly rate the court awarded in a different case only five  
 9 months earlier, the court denied the proposed rate increases finding them to be "excessive." *Id.*

10 Collectively, these cases show that while an attorney may be entitled to a moderate rate  
 11 increase during the course of litigation because of inflation and the attorney's additional years of  
 12 experience, the increase must be reasonable and comparable with rate increases charged for  
 13 similar work in the relevant legal community. Here, Plaintiffs' counsel's rate increases are not  
 14 moderate. (*See* Decl. O'Bannon Supp. Defs.' Opp'n Pls.' Mot. Compel Compensation (Decl.  
 15 O'Bannon), Exs. A-D.) For example, Frank Busch and Tracey Berger of Bingham McCutchen  
 16 seek to increase their rates by thirty-nine and thirty-five percent respectively in two years, Ernest  
 17 Galvan of Rosen, Bien, & Galvan seeks an increased rate of twenty-three percent in two years,  
 18 and Sara Norman of the Prison Law Office—a non-profit organization—seeks to increase her rate  
 19 by twenty-two percent in two years. (*See* Decl. O'Bannon Supp. Defs.' Opp'n Pls.' Mot. Compel  
 20 Compensation (Decl. O'Bannon), Exs. A-D.) These rate increases were not limited to attorneys.  
 21 Indeed, nearly all paralegals at Rosen, Bien & Galvan have sought increases of twenty percent or  
 22 greater in two years, including Karen Stilber, who has sought to increase her rates by fifty-six  
 23 percent. (*See id.*, Ex C.) As demonstrated more fully below, these rate increases are excessive  
 24 and not in line with the rate increases charged by other Bay Area firms for similar work in the  
 25 past two years.

26 **B. Plaintiffs' Counsel Seek Unreasonable Hourly Rate Increases For 2010.**

27 In their fees motion, Plaintiffs' counsel argue that their hourly rate increases are reasonable  
 28 because hourly rates for Bay Area law firms have continue to rise, notwithstanding the difficult

1 economic climate. (Pls.' Mot. Compel Compensation 17.) Plaintiffs' counsel further contends  
 2 that their proposed "modest" hourly rate increases accurately reflect their attorneys' increasing  
 3 capabilities and are "within the norms of the market." (*Id.* at 18.) But, as demonstrated below,  
 4 counsel's proposed rate increases are anything but "modest" or "normal." Indeed, neither  
 5 national rate surveys nor Plaintiffs' counsel's own evidence support their requested fee hikes.

6 In preparation for this opposition, Defendants' counsel reviewed Plaintiffs' counsels'  
 7 billing records for 2008, 2009, and 2010. (Decl. O'Bannon Supp. Defs.' Opp'n Pls.' Mot.  
 8 Compel Compensation (Decl. O'Bannon) ¶ 2.) Defendants' counsel then prepared a spreadsheet  
 9 listing the 2008, 2009, and 2010 billing rates for each timekeeper (e.g., partners, associates,  
 10 litigation assistants, etc.) who worked on *Armstrong*. (*Id.* ¶ 3.) Defendants' counsel then  
 11 calculated the rate increase for each 2009 timekeeper by subtracting each timekeepers' 2008 rate  
 12 from their 2009 rate and dividing the difference by the timekeepers' 2008 rate. (*Id.* ¶ 4.)  
 13 Defendants' counsel repeated this procedure using 2009 and 2010 rates to obtain each  
 14 timekeepers' 2010 rate increase. (*Id.*) Defendants' counsel then calculated the 2009 average  
 15 firm-wide hourly rate increase by adding the hourly rate increase for each *Armstrong* timekeeper  
 16 for 2009 and dividing that sum by the total number of *Armstrong* timekeepers in the firm. (*Id.*)  
 17 The 2010 firm-wide average billing increases were calculated in the same manner except that  
 18 2010 rate increases were used. (*Id.*) Defendants' counsel then added the average firm-wide  
 19 hourly rate increase for 2009 and 2010 for each firm to calculate the total average firm-wide rate  
 20 increases sought by each firm. (*Id.* ¶ 5.)

21 The results are telling. Bingham McCutchen seeks a twenty-nine percent firm-wide rate  
 22 increase. (*Id.* ¶ 6, Ex. B.) Rosen, Bien, & Galvan seek to raise their firm-wide hourly rates by  
 23 nearly twenty percent. (*Id.*, Ex. A.) And the Prison Law Office and the Disability Rights,  
 24 Education & Defense Fund—both non-profit organizations—seek nearly twelve and eight percent  
 25 firm-wide hourly rate increases respectively. (*Id.*, Exs. C & D.)

26 These proposed rate increases are incongruent with rate increases in both the national and  
 27 local legal communities over the past two years. Indeed, in December 2009, the National Law  
 28 Journal published an article entitled "Reality Dawns On Hourly Rates." This article, which

1 summarizes the results of a 2009 nationwide billing rate survey of the nation's largest law firms,  
 2 shows that law firms increased their average firm-wide billing rate by 2.5 percent in 2009. (Decl.  
 3 Greenfield Supp. Defs. Opp'n Pls.' Mot. Compel Compensation (Decl. Greenfield ¶16, Ex. 3.)

4 In December 2009, The Daily Journal published an article entitled "Firms to Hike Billing  
 5 Rates in 2010." (See Decl. Feudale, Ex. D.) A month later, Law.com published a similar article,  
 6 "Despite Down Economy, Law Firms Say They'll Raise Billing Rates." (Decl. Feudale, Ex. E.)  
 7 The articles, which relied upon a 2009 billing rate survey published by Altman Weil, Inc.,  
 8 reported that law firms planned to raise their rates on average 3.2 percent in 2010. (*Id.*, Exs. D &  
 9 E.) A review of a 2009 Altman Weil survey confirms this. According to the survey—which was  
 10 based on responses by 288 U.S. law firms concerning their projected billing rates in 2010—a 3.2  
 11 percent hourly billing rate increase was projected for 2010. (Decl. Feudale, Ex. F.) Indeed, of the  
 12 firms interviewed, only 13.1 percent intended to institute across-the-board rate increases, and of  
 13 those firms, the average rate increase change was 4.1 percent. (*Id.*) But a recent National Law  
 14 Journal article titled "For Firms 2010 Was Full of Billing Blues" shows that these firms were  
 15 overly optimistic. According to the article, which was based on a recent National Law Journal  
 16 survey on billing rates, the average firm-wide billing rate in 2010 increased only 2.7 percent.  
 17 (Decl. Greenfield ¶16, Ex. 2.) The article further quotes an Altman Weil consultant and two  
 18 managing partners who estimate these modest rate increases will continue for the foreseeable  
 19 future, limiting firms' abilities to seek firm-wide rate increases greater than five percent. (*See*  
 20 Decl. Greenfield, Ex. 2.)

21 Bay Area law firms are following this trend, as Plaintiffs' own evidence demonstrates. The  
 22 declarations of attorneys Thomas Loran and Michael Bien describe their overall firm-wide hourly  
 23 rate increases for 2009 and 2010 as "slight" and "modest." (*See* Decl. Loran Supp. Pls.' Mot.  
 24 Compel Compensation ¶ 10; Decl. Bien Supp. Pl.'s Mot. Compel Compensation ¶ 96). Attorney  
 25 Edward Sangster relies on the same news articles referenced above to support his contention that  
 26 Bay Area law firms' billing rates have continued to rise since 2008. (*See* Decl. Sangster Supp.  
 27 Pls.' Mot. Compel Compensation ¶ 8; *see also* Decl. Feudale, Ex. G (articles referenced in  
 28 Sangster's declaration).) And notably absent from any of the remaining declarations—in which

1 partners testified that their Bay Area law firm's rates have increased in each of the last two  
 2 years—are the actual firm-wide rate increase percentages that these declarant's firms have  
 3 charged their clients.<sup>5</sup> (See Decl. Streeter Supp. Pls.' Mot. Compel Compensation ¶ 7; Decl.  
 4 Holtz Supp. Pls.' Mot. Compel Compensation ¶ 20; Decl. Pearl Supp. Pls.' Mot. Compel  
 5 Compensation ¶ 10; Decl. Steuer Supp. Pls.' Mot. Compel Compensation ¶ 6; Decl. Morando  
 6 Supp. Pls.' Mot. Compel Compensation ¶ 6.) Plaintiffs' counsel's attempt to analogize their  
 7 requested rate increases with the rate increases allegedly occurring at other California firms over  
 8 the past two years similarly fails because Plaintiffs' declarants do not state whether the attorneys  
 9 in those firms are of comparable skill, reputation, or experience or whether they engage in equally  
 10 complex federal litigation. *See Blum*, 465 U.S. at 896 n.11; *Prison Legal News*, 608 F.3d at 455;  
 11 *see also* Supp. Decl. Pearl Supp. Pls.' Mot. Compel Compensation pp. 11-24; Decl. Rosen Supp.  
 12 Pls.' Mot. Compel Compensation ¶ 18, Ex. 2.

13 Moreover, a review of the evidence supporting Plaintiffs' counsel's declarations confirms  
 14 that, to the extent Bay Area firms are increasing rates at all, the hourly billing rate increases for  
 15 Bay Area partners and associates have been modest. For example, Exhibit D, attached to the  
 16 declaration of San Francisco partner Geoffrey Holtz indicates that rate increases in 2008 to 2009  
 17 for Bingham McCutchen's "peer group" of firms (presumably firms providing similar services)  
 18 have ranged from 2.9 percent to 3.2 percent for partners and 4.2 percent for all lawyers.<sup>6</sup> (Decl.  
 19 Greenfield ¶ 17(a).) Likewise, Exhibit 9 attached to Maria Morris's declaration shows that  
 20 partners Alan Annex, David Bradley, and Leslie Corwin of Greenberg Traurig raised their rates  
 21 between 3 and 6.6 percent from 2008 to 2009. (*Id.* ¶ 17 (d).) And Peter Benvenutti—a partner at

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23 <sup>5</sup> In his supplemental declaration, Mr. Holtz only provides the "standard billing" rates for  
 24 the three Bingham attorneys working on *Armstrong*, not the firm's hourly billing rates for each of  
 25 its time keepers in other matters. (See Supp. Decl. Holtz ¶¶ 3-5.) Moreover, Mr. Holtz's  
 26 supplemental declaration is inaccurate. In it, Mr. Holtz asserts that Ms. Berger and Mr. Busch's  
 27 hourly rates rose 5.2 percent in 2009, and 9 and 11 percent respectively in 2010. (*Id.* ¶¶ 4-5.) In  
 28 truth, the rate increases were as follows: 15.9 percent for Ms. Berger in 2009, twenty percent for  
 Ms. Berger in 2010, 5.3 percent for Mr. Busch in 2009, and 33 percent for Mr. Busch in 2010.  
 (See *id.* ¶¶ 3-5.)

<sup>6</sup> Ironically, the firm-wide rate increases Bingham seeks in this action for 2008-2009 are  
 more than double the rate increases of Bingham's peers for the same time period. (Compare  
 Decl. Holtz, Ex D with Decl. O'Bannon, Ex. B.)

1 the San Francisco office of Jones Day—raised his rates by only 4 percent during the same time  
 2 period. (*Id.* ¶ 17(e); *see* Decl. Morris Supp. Pls.’ Mot. Compel Compensation, Ex. 2.) Mr.  
 3 Benvenutti’s colleague, Peter Crosby, did not raise his rates at all. (*Id.*) Associates’ billing rates  
 4 have been similarly limited to 3.2 percent between 2008 to 2009, as shown by Geoffrey Holtz’s  
 5 declaration. (Decl. Greenfield ¶ 18; *see* Decl. Hotlz Supp. Pls.’ Mot. Compel Compensation, Ex.  
 6 D.)

7 Defendants’ expert, Gary Greenfield, is a former partner at Shartis, Friese & Ginsburg, and  
 8 the founder of Litigation Cost Management, a legal-fee consulting business. (Decl. Greenfield ¶¶  
 9 2, 8.) Mr. Greenfield regularly conducts analyses for both plaintiffs and defendants concerning  
 10 the reasonableness of legal fees and expenses sought in various types of cases, including class  
 11 actions. (*Id.* ¶¶ 4-5.) He has prepared over one hundred reports on attorneys’ fees issues, and in  
 12 almost all cases has undertaken some evaluation of the rates being sought. (*Id.* ¶ 5.) He has also  
 13 testified numerous times as a fees expert and served as a Special Master to analyze firms’ fees  
 14 and expenses in a conservation proceeding before the San Francisco Superior Court. (*Id.* ¶ 7.)  
 15 Accordingly, Mr. Greenfield is well-familiar with the range of rates being charged by Bay Area  
 16 law firms practicing complex litigation. (*Id.* ¶ 11.)

17 According to Mr. Greenfield, law firm billing rates, including the rates of large law firms,  
 18 have not increased in the last several years at the same pace as in prior years (e.g., 5 to 10 percent  
 19 annually in prior years). (*Id.* ¶¶ 15, 19.) In fact, the norm was for firms not to raise rates at all in  
 20 2009. (*Id.* 19.) For example, instead of raising its rates in 2009, Manatt, Phelps & Phelps froze  
 21 its billing rates and even reduced the rates for its lower level associates. (*Id.*; *accord* Decl. Pearl  
 22 Supp. Pls.’ Mot. Compel Compensation p. 13.) In Mr. Greenfield’s opinion, the average firm-  
 23 wide rate increases for large Bay Area law firms handling complex litigation between 2008 and  
 24 2010 are consistent with the average rate increases referenced in the National Law Journal  
 25 surveys referenced above, namely 2.5 percent in 2009 and 2.7 percent in 2010. (Decl. Greenfield  
 26 ¶ 21.)

27 Thus, as the undisputed evidence shows, and as even Plaintiffs’ counsel concedes, law  
 28 firms throughout the nation and in the Bay Area have only raised their rates “slightly” and

1 "modestly" in the past two years. Based on a review of the aforementioned surveys, and  
2 Defendants' expert's opinion, Bay Area law firms have increased their firm-wide billing rates on  
3 average between 2.5 and 2.7 percent a year in both 2009 and 2010. This amounts to a total firm-  
4 wide rate increase of no more than 5.2 percent over a two-year period. This is in sharp contrast to  
5 Plaintiffs' counsel's proposed across-the-board rate increases ranging from nearly eight percent to  
6 twenty-nine percent over the same time period.

7 Because Plaintiffs' counsel fail to show that their firms' proposed hourly rate increases are  
8 commensurate with the hourly rate increases of other Bay Area law firms since 2008, their  
9 motion must be denied. *Blum*, 465 U.S. at 895 (the fee applicant bears the burden of proving that  
10 the requested rates are in line with those prevailing in the relevant community).

## 11 CONCLUSION

12 In this economic climate, where the people of California continue to endure substantial cuts  
13 to vital social services, every dollar counts. Here, Plaintiffs' counsel's proposed hourly rate  
14 increases go far beyond the amount needed to ensure that inmates receive legal representation to  
15 vindicate their federal rights. Instead, Plaintiffs' counsel seeks firm-wide rate increases  
16 significantly higher than the annual rate increases sought by numerous firms in both the Bay Area  
17 and throughout the nation. Like private fee paying clients, the California taxpayers simply cannot  
18 afford to pay such rate increases in this recession. Accordingly, Plaintiffs' counsel's motion must  
19 be denied. Alternatively, should the Court decide that a rate increase is warranted, Plaintiffs'  
20 counsel should be awarded no greater than a total of a 5.2 percent firm-wide hourly rate increase

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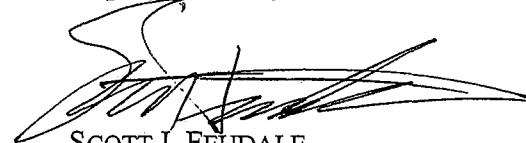
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1 from their 2008 billing rates, consistent with national and local averages.

2 Dated: March 22, 2011

3 Respectfully Submitted,

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## CERTIFICATE OF SERVICE

Case Name: J. Armstrong v.  
Schwarzenegger, et al.

No. C 94 2307 CW

I hereby certify that on March 22, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

### **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPENSATION**

### **DECLARATION JAMES BLEVINS IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPENSATION**

### **DECLARATION OF SCOTT J. FEUDALE IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPENSATION (w/Exhibits A thru G)**

### **DECLARATION OF GARY GREENFIELD IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPENSATION (w/Exhibits 1 to 3)**

### **DECLARATION OF DANIELLE O'BANNON IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPENSATION w/Exhibits A thru E)**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 22, 2011, at San Francisco, California.

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M. Luna  
Declarant

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M. *Luna*  
Signature